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IN THE

Supreme Court of the United States

U-HAUL INTERNATIONAL, INC., ET AL.,

Petitioners,

v.

KAREN ROMANO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 14, 2001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "integrated enterprise" test may be used to charge a parent corporation with vicarious liability under Title VII for the employment decisions of its subsidiary where it is undisputed that the parent played no role in the employment decisions affecting the employee, and there were no circumstances for piercing the corporate veil.

2. Whether punitive damages may be automatically imputed to a parent corporation by application of the integrated enterprise test, without a finding of any wrongdoing by the parent, and without any separate analysis of the parent's consciousness of wrongdoing or good faith efforts to comply with Title VII.

3. Whether punitive damages are available under Title VII in the absence of compensatory damages.

4. Whether nominal damages are available under Title VII.

5. Whether the question of a parent corporation's status as an "employer" under Title VII is a threshold issue of subject matter jurisdiction not subject to waiver.

RULE 29.1 STATEMENT

The petitioners are U-Haul International, Inc. and U-Haul Co. of Maine, Inc., defendants-appellants below. U-Haul Co. of Maine, Inc. is a wholly owned subsidiary of U-Haul International, Inc., which is a wholly owned subsidiary of AMERCO, a publicly traded company.

The respondent is Karen Romano, a resident of the State of Maine, who was plaintiff-appellee below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, U-Haul International, Inc. and U-Haul Co. of Maine, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered December 7, 2000.

OPINIONS BELOW

The First Circuit opinion is reported at 233 F.3d 655 (1st Cir. 2000) and annexed hereto as Appendix A (A. 1a). The opinion and judgments of the District Court for the District of Maine are not officially reported and are annexed hereto as Appendix B (A. 37a). The order of the First Circuit denying petitioners' request for rehearing and rehearing en banc is annexed hereto as Appendix C (A. 45a).

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered on December 7, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on February 13, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS AT ISSUE

This case involves the following federal statutes, the pertinent provisions of which are annexed hereto as Appendix D (A. 47a):

1. 42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964.

2. 42 U.S.C. § 1981a, the Civil Rights Act of 1991.

STATEMENT OF THE CASE

Karen Romano ("Romano") was hired by the local manager of the Waterville, Maine U-Haul Center and began work on May 1, 1996, as a customer sales representative. The Waterville Center is part of U-Haul Co. of Maine, Inc. ("U-Haul Maine"), which, in turn, is a wholly owned subsidiary of U-Haul International, Inc. ("UHI").

Just two weeks later, on May 14 or 15, Romano's employment was terminated by the same manager who had hired her. Romano claimed her termination was impermissibly based on her gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. § 4613. It was undisputed that all employment decisions as to Romano were made by U-Haul Maine personnel and that no UHI employee had any involvement at all in those employment decisions.

Romano sued both U-Haul Maine and its parent UHI. UHI answered by stating it was not Romano's employer and subsequently moved for summary judgment on that ground. One of the legal arguments raised by UHI was that it could not be considered Romano's employer under agency principles. The District Court denied the

summary judgment motion, ruling that it would apply some variant of the "single employer" or "integrated enterprise" test.

At the outset of the trial, the District Court again ruled it would apply some variant of the four-factor integrated enterprise test. The action was tried before a jury over the course of three days, on June 23, 24 and 28, 1999. The opinion of this Court in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), was issued June 22, 1999. On June 29, 1999, the jury returned an initial verdict for Romano, awarding $0 in compensatory damages, $15,000 in nominal damages, and $625,000 in punitive damages against both UHI and its subsidiary U-Haul Maine. The District Court decided, incorrectly, that the jury's award of $15,000 in nominal damages was inconsistent with its award of $0 in compensatory damages. Over petitioners' objections, the District Court resubmitted to the jury the two Special Interrogatories on compensatory and nominal damages, instructing the jury that its verdict showed "confusion" between the two questions. After further deliberation, the jury returned with a verdict of $15,000 compensatory damages and no nominal damages.

On July 15, 1999, the District Court entered judgment for Romano, awarding $15,000 in compensatory damages and $285,000 in punitive damages, in conformity with Title VII damages caps. *See* 42 U.S.C. § 1981a(b)(3). On July 28, 1999, petitioners moved for judgment as a matter of law, a new trial and, in the alternative, remittitur. The District Court denied the post-trial motions on October 28, 1999,

stating that in their post-trial motions petitioners "restate legal and factual arguments made in the Motion for Summary Judgment and at trial." (A. 37a-38a). Amended judgment was entered on October 29, 1999.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE APPLICATION OF THE INTEGRATED ENTERPRISE TEST IN TITLE VII CASES DIRECTLY CONFLICTS WITH TWO SEPARATE LINES OF SUPREME COURT JURISPRUDENCE.

A. SUPREME COURT PRECEDENT MANDATES CONSTRUCTION OF TITLE VII UNDER COMMON LAW AGENCY PRINCIPLES.

Whether a parent corporation is an "employer" of its subsidiary's employees for Title VII purposes must be determined by common law agency principles and common sense dictionary definitions—and not by application of some judicially created artificial construct such as the "integrated enterprise" test. The "integrated enterprise" test is a legal fiction created by the judiciary for use in NLRA cases. *See Radio & Television Broad. Technicians Local Union* v. *Broad. Serv. of Mobile, Inc.*, 380 U.S. 255 (1965) (per curiam). It is no part of the common law of agency and must be rejected under the principles so repeatedly and clearly enunciated by the Supreme Court.

As early as 1986, this Court held that common law agency principles should be applied in Title VII cases:

> *Congress wanted courts to look at agency principles for guidance in this area.* While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Meritor Sav. Bank v. *Vinson*, 477 U.S. 57, 72 (1986), *citing* Restatement (Second) of Agency §§ 219-237 (1958) (emphasis added).

When this Court next construed employment relationships under Title VII, it again declared that common law agency principles should govern:

> *In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.* We rely "on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 740 (1989).

Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742, 754-55 (1998) (emphasis added). *Accord*

Faragher v. *City of Boca Raton*, 524 U.S. 775, 791-92 (1998) ("the very definition of employer in Title VII, as including an 'agent', . . . expressed Congress's intent that courts look to traditional principles of the law of agency").

Most recently, in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), this Court relied on *Meritor*, *Ellerth*, and *Faragher* to hold that common law agency principles must also be applied in analyzing the availability of punitive damages under Title VII. *Id.* at 541-42.

Common law agency principles were expressly applied to the definition of "employer" and "employee" in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 319 (1992) (the term "employee" should be construed to determine when an employee/employer relationship exists in the ERISA context under "*traditional agency law criteria* for identifying master-servant relationships") (emphasis added). It must be assumed that Congress used the terms "employee" and "employer" in accordance with their "settled meaning . . . under the common law." *Id.* at 322, *quoting Reid*, 490 U.S. at 739-40 ("In the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."). Thus, in *Reid*, this Court interpreted "employee"

under the Copyright Act in accordance with agency principles.[1/]

Significantly, in *Darden*, this Court noted that because the definition of "employee" under the NLRA differed from and was broader than that in ERISA (which is like that of Title VII), the various tests established by case law under the NLRA were inapplicable. *See id.* at 325. The Supreme Court thus instructed that artificial tests created under the NLRA to judge employer-employee status should be rejected in favor of common law agency principles. Because the definitions of "employer" and "employee" under ERISA, Title VII and the ADEA are virtually identical, *Darden's* holding applies with equal force to Title VII cases. *See, e.g., Dominiguez-Cruz* v. *Suttle Caribe, Inc.*, 202 F.3d 424, 428 n.2 (1st Cir. 2000) (Title VII, ADEA and ERISA stand *in pari passu* and judicial precedents interpreting one statute are instructive in interpreting another); *Duckworth* v. *Pratt & Whitney, Inc.*, 152 F.3d 1, 6 (1st Cir. 1998) (same).

This Court has also held that other words in Title VII should be given their common "straightforward" meaning: "In the absence of an indication to the contrary, words in a statute are assumed to bear their ordinary, contemporaneous common meaning." *Walters* v. *Metro. Educ.*

[1/]The courts of Maine also apply the common law agency principles of the Restatement (Second) of Agency (1958) to define employment relationships. *See, e.g., McLain* v. *Training & Dev. Corp.*, 572 A.2d 494 (Me. 1990).

Enters., 519 U.S. 202, 207 (1997) (interpreting the word "has" in Title VII).

Further support emerges from the legislative history of Title VII. When asked to define "employer" as used in the statute, Sen. Clark responded: "The term "employer" is intended to have its common dictionary meaning, except as expressly qualified by the act." 110 Cong. Rec. 7216 (April 8, 1964) (statement of Sen. Clark). The common dictionary meaning of employer is "[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker's salary or wages. Cf. PRINCIPAL." Black's Law Dictionary 544 (7th ed. 1999). *See also* Gerald Hill and Kathleen Hill, *The Real Life Dictionary of the Law*, http://dictionary.law.com, accessed on May 9, 2001 ("a person or entity which hires the services of another called a principal in the law of agency").[2/] No common law, common sense, or common dictionary meaning of "employer" incorporates a creature such as the four-factor "integrated enterprise" test. Accordingly, Title VII must be construed in light of common law agency principles. *See Papa* v. *Katy Indus., Inc.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999).

[2/] "The elements of common-law agency are present in the relationships between employee and employer. . . ." Restatement (Third) of Agency §1.01, comment c, at 21 (Tentative Draft No. 2, March 14, 2001).

One cannot logically apply a common law agency test to define "employee" and then apply some other test to define "employer." The definitions in the statute are, in essence, mirror images of each other, "completely circular" as the *Darden* Court held. 503 U.S. at 323. *Compare* 42 U.S.C. § 2000(e)(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . ;") *with* 42 U.S.C. § 2000(e)(f) ("The term 'employee means an individual employed by an employer . . . ."). Simultaneous application of an artificial construct such as the "integrated enterprise" test to the term "employer" and a common law agency test to define "employee" produces inconsistent and absurd results. Here, for example, under application of common law agency principles, Romano could *not* be considered an "employee" of UHI. It is absurd to suggest that while Romano is not its employee, UHI is nonetheless her "employer."

The First Circuit rejected the agency test in favor of the "integrated enterprise" test. This was error, and certiorari should be granted.

B. SUPREME COURT PRECEDENT FORBIDS DISPLACEMENT OF STATE LAW OF CORPORATIONS.

To extend the reach of Title VII upward to parent corporations by means of an artificial judicial construct violates not only the established rules of agency but also impermissibly interferes with matters of state law contrary to the precepts established in *Erie R. Co.*

v. *Tompkins*, 304 U.S. 64 (1938) (there is "no federal general common law"). In the absence of express Congressional authorization, federal courts simply have no power to create federal common law. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988); *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981). Title VII contains neither express nor implied authorization for federal courts to depart from common law principles of both agency and the law of corporations in order to apply some judicially created test in derogation of well established common law principles.[3/]

A long line of Supreme Court cases has repeatedly upheld the limited scope of the potential liability of parent corporations for the acts of their subsidiaries. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent

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[3/]Common law concepts of limited liability and corporate form are traditionally matters of state law. *See, e.g., J.F. McKinney & Assocs., Ltd.* v. *Gen. Elec. Inv. Corp.*, 183 F.3d 619, 621 (7th Cir. 1999) (whether corporate forms may be disregarded is a matter of state law); *Longhi* v. *Animal & Plant Health Inspection Serv.*, 165 F.3d 1057, 1061 (6th Cir. 1999) ("person" will be interpreted under the federal Animal Welfare Act in accord with traditional corporate law concepts, and not under some judicially created standard, because piercing the corporate veil is a matter of state law); *Stoebner* v. *Lingenfelter*, 115 F.3d 576, 579 (8th Cir. 1997) (piercing the corporate veil is a question to be determined by state law and not by a judicially created standard under the bankruptcy laws).

corporation . . . is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998), *quoting* Douglas and Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929) (holding that CERCLA, 42 U.S.C. § 601 *et seq.*, does not displace state law of corporations and that parent corporations can be liable for acts of subsidiaries only under corporate veil piercing standards or upon active wrongdoing by the parent itself). *See also Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").

There is nothing in Title VII to indicate "'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based on a federal statute.'" *Bestfoods*, 524 U.S. at 63, *quoting Burks* v. *Lasker*, 441 U.S. 471, 478 (1979). Thus, a parent corporation can be held liable for the acts of its subsidiaries under two scenarios: (1) where the parent has participated in, controlled, or otherwise actively taken part in the wrongful act giving rise to liability (i.e., under common law agency principles) or (2) where the relationship between parent and subsidiary is such that the corporate veil may be pierced under state common law principles. *See Bestfoods*, 524 U.S. at 62-65. The first type of liability is direct; the second, derivative. *Id.*

In the Title VII context, then, direct liability for the parent's own actions (i.e., actual participation in the employment decision claimed to violate Title VII) must be kept distinct from derivative liability under veil piercing standards.

See Bestfoods, 524 U.S. at 67. The integrated enterprise test is an unfortunate amalgam of both derivative and direct principles: it focuses on the relationship between the two corporations (an issue going to indirect liability) instead of focusing on the parent's involvement with the subsidiary's alleged discriminatory actions (the source of any direct liability). *Id.* at 67. As a consequence, it incorrectly treats Title VII "as though it displaced or fundamentally altered common law standards of limited liability," *id.* at 70, and must therefore be rejected. Certiorari should be granted.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW.

A. THERE IS A SPLIT AMONG THE CIRCUITS AS TO THE PROPER TEST TO DETERMINE PARENT LIABILITY UNDER TITLE VII.

The First Circuit acknowledged there is a split among the circuits in the standard adopted to determine "employer" status under Title VII, *Romano*, 233 F.3d at 664–65, and that there is a further split among the circuits adopting the integrated enterprise test in defining and emphasizing the four factors of that test. *Id.* at 666. The following demonstrates the scattered approach presently being applied in the lower courts.

1st Circuit Adopts integrated enterprise test, but does not look to day-to-day control or parent's actual participation in the discriminatory act. *Romano*, 233 F.3d at 666.

2d Circuit Adopts integrated enterprise test, and requires that the parent actively participate in the discriminatory act. *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995).

3d Circuit Suggests that courts should determine whether to "pierce the corporate veil," *Marzano* v. *Computer Sci. Corp., Inc.*, 91 F.3d 497, 513-14 (3d Cir. 1996), or perform a functional analysis of the relationship between parent and employee, *Graves* v. *Lowery*, 117 F.3d 723, 727-29 (3d Cir. 1997).

4th Circuit Holds that a parent corporation "is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity." *Johnson* v. *Flowers Indus., Inc.*, 814 F.2d 978, 980-81 (4th Cir. 1987).

5th Circuit Adopts integrated enterprise test, focuses on centralized control of labor relations and requires that the parent actively participate in the discriminatory act. *Skidmore* v. *Precision Printing & Packaging, Inc.*, 188 F.3d 606, 616-17 (5th Cir. 1999).

6th Circuit Adopts integrated enterprise test, but notes that "[a]ll four criteria need not be present in all cases." *Armbruster* v. *Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983).

7th Circuit Applies common law agency and veil-piercing principles and expressly rejects integrated enterprise test. *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 940-41 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999).

8th Circuit Adopts integrated enterprise test with no apparent emphasis on any particular factor. *Williams* v. *Evangelical Ret. Homes of Greater St. Louis*, 594 F.2d 701, 703 & n.2 (8th Cir. 1979).

9th Circuit Adopts both integrated enterprise test and/or "traditional indicia of an agency relationship." *Childs* v. *Local 18, I.B.E.W.*, 719 F.2d 1379, 1382-83 (9th Cir. 1983). *See also Laughton* v. *Int'l Alliance of Theatrical Stage Employees, etc.*, No. 99-15812, 2001 U.S. App. Lexis 7887, at *7-9 (9th Cir. April 30, 2001).

10th Circuit Identifies three tests: (1) common law agency; (2) the "hybrid" common law economic realities test; and (3) the integrated enterprise test. *Lockard* v. *Pizza Hut, Inc.*, 162 F.3d 1062, 1069-70 (10th Cir. 1998).

11th Circuit Identifies three tests: (1) the integrated enterprise test; (2) the "joint employer" test; and (3) an agency approach. *Lyes* v. *City of Riviera Beach, Fla.*, 166 F.3d 1332, 1341 (11th Cir. 1999).

D.C. Circuit Indicates that integrated enterprise test would be applied to employment discrimination actions. *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625-26 (D.C. Cir. 1997).

In short, nearly every circuit applies a different standard, resulting in a crazy quilt patchwork of tests.[4/]

B. THIS IMPORTANT QUESTION OF FEDERAL LAW SHOULD BE SETTLED BY THE SUPREME COURT.

Principles of *stare decisis* are the bedrock of our judicial system. With rare exception the lower federal courts have apparently failed to realize that this Court's decisions in *Meritor, Ellerth, Faragher, Kolstad* and *Bestfoods* are in direct conflict with application of the integrated enterprise test in Title VII cases. Certiorari should be granted to ensure that the prior

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[4/]Other surveys of the wide variety of single employer tests are found at Mark Crandley, *The Failure of the Integrated Enterprise Test: Why Courts Need to Find New Answers to the Multiple-Employer Puzzle in Federal Discrimination Cases*, 75 Ind. L.J. 1041 (Summer 2000), and Shauna Wagner, *Annotation: Propriety of Treating Separate Entities As One For Purposes of Determining Number of Employees Required by Title VII of Civil Rights Acts of 1964 (42 U.S.C.A. § 2000e(b)) for Action Against Employer*, 160 A.L.R. Fed. 441 (2000).

decisions of this Court are given precedental effect.

Application of the integrated enterprise test to impute liability to a parent corporation for the acts of its subsidiaries vitiates state law of corporations and thus seriously implicates *Erie*. Certiorari should be granted to ensure that the lower federal courts in Title VII cases do not neglect to respect our deeply rooted notions of federalism.

The lower federal courts have ignored the plain meaning of the word "employer" and expanded the reach of Title VII well beyond that intended by Congress. Certiorari should be granted to ensure that Congressional intent is respected.

Extension of Title VII liability to parents through rote application of the integrated enterprise test defeats the prophylactic purposes of the statute. It leads parent corporations to abdicate all responsibility and contact with subsidiaries as to the federal discrimination laws, in order to avoid the possibility that involvement will result in liability for acts over which they have no practical control. Title VII is better served by encouraging parent corporations to issue broad guidelines and general statements of policies to their subsidiaries to comply with the anti-discrimination laws, without fear of thereby being found to be an integrated enterprise. Change comes from the top down, and the examples and goals set by the parent will foster compliance by its subsidiaries. There can be no doubt that broad pronouncements and

admonitions by the CEO of General Motors about the importance of federal anti-discrimination laws carry more weight than enunciation of the very same principles by the plant manager of the GM plant in Peoria.

The general involvement of parent corporations is desirable as well for the "ripple effect" it has on other companies. For better or worse, large conglomerates are important and highly visible role models. If the CEO of the parent of a major group of affiliated companies speaks about the importance of the anti-discrimination laws, it will encourage other, smaller companies to view these statutes similarly.

Application of the integrated enterprise test may well prompt parent corporations to move their operations off-shore, out of the reach of Title VII, *see EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244 (1991),[5/] and thereby adversely affect commerce generally, decrease state and local tax revenues, result in higher unemployment in the United States, and lead to other undesirable economic effects.

Certiorari should be granted to establish uniformity among the circuits on this important issue of federal law. The circumstances under which a subsidiary's Title VII liability may be

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[5/]This case has been superseded by statute on other grounds, as stated in, e.g., *Stender* v. *Lucky Stores, Inc.*, 780 F. Supp. 1302, 1304 (N.D. Cal. 1992).

imputed to its parent should not depend on the circuit in which the suit is brought. Parent and subsidiaries may reside in or be sued in different circuits, and the subsidiary itself may have different facilities in different circuits. Parent corporations need definite guidelines and uniform standards so they may appropriately structure their business operations. The use of different standards in each circuit will inevitably result in forum shopping and unequal treatment of both Title VII plaintiffs and defendant parent corporations.

A decision on this important issue by this Court will promote judicial economy and conserve judicial resources. The decisions of the lower federal courts are confusing, conflicting, and often internally inconsistent.[6/] Clarification by this Court of the principles of parent liability in the Title VII context will dramatically decrease the use of the integrated enterprise test to evade Title VII jurisdictional requirements and caps on damages;[7/] will permit parent corporations that are plainly not employers to obtain dismissal or summary judgment at an early stage of the case

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[6/]Here, for example, the First Circuit held that the "interrelated operations" prong must focus on day-to-day operations but did not require day-to-day control under the "employment relations" prong.

[7/]*See, e.g., Romano*, 233 F.3d 655 (only reason to add parent was to evade damages caps); *Caudle* v. *Bristow Optical Co.*, 224 F.3d 1014 (9th Cir. 2000) (plaintiff moved to add parent as a defendant after the verdict in order to evade damages caps).

rather than engage in needless discovery regarding integrated operations; will result in plainer jury instructions[8/] and thus reduce the chance of error; and cumulatively will result in fewer appeals.

Many if not most Title VII cases also involve a claim under the state law anti-discrimination analogue. Generally speaking, states appear to apply common law, common sense principles of agency law to define "employer" for purposes of determining vicarious liability. *See* John F. Buckley and Ronald M. Green, 1999 State by State Guide to Human Resources Law § 2.3, 2-13 (1999). States do not use the integrated enterprise or other artificial construct to ignore the principles of corporate limited liability. Application of one definition of "employer" for the Title VII claim and another definition of "employer" for the state law claim will inevitably

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[8/]For example, at least one federal district court has stated that control of labor relations is the *critical* factor to finding an integrated enterprise while at the same time stating that control of labor relations is not a *necessary* factor. *Meng* v. *Ipanema Shoe Corp.*, 73 F. Supp. 2d 392 (S.D.N.Y. 1999). In instructing the jury in this case, the District Court merely listed the four factors without any explanation of what they meant. How is a jury to understand "interrelation of operations" when federal courts differ over what it means? *Compare Knowlton* v. *Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 n.7 (10th Cir. 1999) (operations focuses on shared books and records, shared office space, i.e., issues of corporate form and governance), *with Romano*, 233 F.3d at 655 (advertising, sales and marketing are elements of operations, i.e., issues related to business operations).

result in jury confusion and may lead to conflicting and possibly absurd results.

This issue is significant and affects virtually all major United States corporations. "In 1995, the ten largest companies on the Fortune 500 owned an average of 62 subsidiaries each. Many subsidiary corporations, though owned entirely by another corporation, are themselves gigantic corporate enterprises." Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 Hastings L.J. 287 (January 1996). As mergers and consolidations continue, the issue will become even more important.[9/] The magnitude of the issue is increased exponentially by the lower courts' application of the Title VII "integrated enterprise" test to the numerous other federal anti-discrimination statutes[10/] as well as in other labor relations contexts.[11/]

[9/]In 1982, each of the 1,000 largest United States industrial corporations on average controlled 48 subsidiaries. Phillip I. Blumberg, *The Law of Corporate Groups: Substantive Law* xxxiii (1987); Phillip I. Blumberg, *The Law of Corporate Groups: Procedural Law* 463-74 (1983). Thus, the trend is toward larger numbers of subsidiaries.

[10/]The integrated enterprise test has been applied to claims under the ADA, *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 625 (D.C. Cir. 1997), the ADEA, *Johnson* v. *Flowers Indus., Inc.*, 814 F.2d 978, 980-82 (4th Cir. 1987), and the FMLA, *Douglas* v. *E.G. Baldwin & Assocs., Inc.*, 150 F.3d 604, 606-07, 608 (6th Cir. 1998).

[11/]*See, e.g., Pearson* v. *Component Tech. Corp.*, ___ F.3d ___, 2001 WL 369784 at *10-11, *12-13 (3d Cir. 2001)

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE FIRST CIRCUIT'S DECISION AS TO THE AWARD OF PUNITIVE DAMAGES AGAINST THE PARENT CORPORATION IS DIRECTLY CONTRARY TO SUPREME COURT PRECEDENT AND THE LANGUAGE OF TITLE VII.

A. *KOLSTAD* FORBIDS THE AUTOMATIC IMPUTATION OF PUNITIVE DAMAGES TO A PARENT CORPORATION UNDER THE INTEGRATED ENTERPRISE TEST WHERE THERE WAS NO SHOWING OF ANY CONSCIOUS WRONGDOING BY THE PARENT.

The First Circuit approved the automatic imputation of punitive damages to the parent corporation solely on the basis of the integrated enterprise test, *Romano*, 233 F.3d at 669-70 ("After finding that U-Haul International and U-Haul Company of Maine were a single employer for purposes of Title VII, Smedberg's position as President of U-Haul Company of Maine qualifies him as a manager of U-Haul International as well."), without any finding whatsoever that the subsidiary's manager was also acting as an agent of the parent, and without any separate analysis or finding as to the parent's consciousness of wrongdoing. Significantly, the subsidiary's manager was not an officer or director of the

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(applying integrated enterprise test in action under WARN, 29 U.S.C. § 2101 *et seq.*).

parent corporation. The First Circuit simply held that because the two companies had been found to be a single employer, the manager of the subsidiary was a manager of the parent as well. *Id.*

As this Court enunciated in *Kolstad*, "[t]he common law has long recognized that agency principles limit vicarious liability for punitive awards." 527 U.S. at 541. "Accordingly, 'a positive element of conscious wrongdoing is always required.'" *Id.* at 538, *citing* McCormick, Law of Damages (1935). Vicarious liability for punitive damages cannot be assessed against UHI unless *it*—and not some employee of one of its subsidiaries—committed some conscious wrongdoing. *See Kolstad*, 527 U.S. at 539-42. This is also the law of Maine. *Kopenga* v. *Davric Me. Corp.*, 727 A.2d 906 (Me. 1999) (punitive damages cannot be imposed on one who commits no wrongful act).

The jury was improperly permitted to impute liability for punitive damages to UHI on the basis of pure vicarious liability, without any evidence of conscious wrongdoing—indeed, any action whatsoever—by UHI. This grossly contravened the mandate of *Kolstad*, which requires a separate analysis and finding as to *both* UHI's state of mind and UHI's good faith efforts to comply with Title VII. No such findings were made by the jury, nor did the evidence support such a finding. Yet it remains the case that, in order to obtain punitive damages, Romano must "demonstate[ ] that [UHI] engaged in a discriminatory practice . . . with malice or with reckless indifference" to her federally

protected rights. 42 U.S.C. § 1981a(b)(1). Certiorari should be granted.

B. THIS CASE PRESENTS QUESTIONS OF FIRST IMPRESSION ABOUT THE CIRCUMSTANCES UNDER WHICH PUNITIVE DAMAGES CAN BE AWARDED UNDER 42 U.S.C. § 1981a.

1. PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER TITLE VII IN THE ABSENCE OF ACTUAL INJURY OR COMPENSATORY DAMAGES.

The jury's original verdict awarded plaintiff $0 in compensatory damages (Interrogatory 4), $15,000 in nominal damages (Interrogatory 5), and $625,000 in punitive damages (Interrogatory 6). Despite the lack of any inconsistency in the answers to the special interrogatories, the District Court resubmitted Interrogatories 4 and 5 to the jury, telling them there was confusion in their answers. The jury then changed its verdict. Resubmission in the absence of inconsistency was error, and the jury's original verdict of no compensatory damages must be reinstated.

Once the original verdict is reinstated, no award of punitive damages can be sustained. Punitive damages are not available under 42 U.S.C. § 1981a in the absence of an award of compensatory damages. *See* H.R. Rep. No. 102-40(I) p. 72, *reprinted in* 1991 U.S.C.C.A.N. 610 ("Plaintiffs must first prove intentional

discrimination, then must prove *actual injury or loss* arising therefrom to recover compensatory damages, and must meet an even higher standard to recover punitive damages.") (original emphasis). *See also Quint* v. *A.E. Staley Mfg. Co.*, 172 F.3d 1, 21 n.10 (1st Cir. 1999) (punitive damages recoverable under ADA "as long as some compensatory damages are awarded or the district court awards back pay"); *Provencher* v. *CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5 (1st Cir. 1998) (punitive damages available under § 1981a where plaintiff has been awarded either compensatory damages or other actual damages such as back pay).

This raises an important question of first impression, and certiorari should be granted.

2. NOMINAL DAMAGES ARE NOT AVAILABLE UNDER SECTION 1981a.

42 U.S.C. § 1981a speaks only of "compensatory and punitive" damages. Nothing in the statute authorizes an award of nominal damages under Title VII. Only one Circuit has held that punitive damages are available under § 1981a in the absence of actual damages, either compensatory or equitable. *See Timm* v. *Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998). The First Circuit, without published opinion, has affirmed a district court ruling that nominal damages are *not* available under Title VII. *See Afanador* v. *United States Postal Serv.*, 787 F. Supp. 261, 274 (D.P.R. 1991), *aff'd*, 976 F.2d 724 (1st Cir. 1992).

Because this question raises a novel issue concerning an important federal law and because there is a conflict in the circuits, this Court should grant certiorari.

IV. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A THRESHOLD ISSUE OF SUBJECT MATTER JURISDICTION IS PRESENTED BY THE QUESTION OF WHEN A PARENT IS AN "EMPLOYER" OF ITS SUBSIDIARY'S EMPLOYEES FOR TITLE VII PURPOSES.

The First Circuit held that petitioners had waived their arguments against application of the integrated enterprise test because they did not fully articulate the alternative common law agency standard they proposed be used in its stead. The First Circuit's waiver decision was erroneous for numerous reasons not pertinent for certiorari purposes.[12/]

[12/]First, the First Circuit erred as a factual matter when it stated that petitioners had not raised the agency argument at any time in the proceedings below. In fact, the agency issue was briefed extensively by petitioners in their summary judgment motion. The District Court denied the summary judgment motion, ruling that it would apply some variant of the integrated enterprise test. Petitioners renewed their agency arguments in their post-trial motions, and the District Court's order denying those motions expressly acknowledged that petitioners had "restate[d] legal and factual arguments made in their Motion for

Assuming *arguendo* that petitioners waived that argument at the District Court level, the waiver was immaterial to the appeal before the First Circuit. Because the "employer" question is an issue of subject matter jurisdiction, it was not subject to waiver and should have been addressed by the First Circuit.

The circuits are divided on the general question whether defendant's status as a putative Title VII "employer" presents an issue of subject matter jurisdiction or whether determination of a

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Summary Judgment" and denied the post-trial motions on the same grounds.

Second, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), applies because the District Court *twice* relied on petitioners' agency argument and twice rejected it. The First Circuit conceded that petitioners repeatedly and consistently argued that the parent UHI was not plaintiff's employer *Romano*, 233 F.3d at 662, and that petitioners objected to the jury instructions because the parent corporation was not a final decision maker in connection with the employment at issue. *Id.* at 663.

Third, the First Circuit erred in concluding that the District Court's application of the integrated enterprise test in this case was not plain error. *See* discussion in Section I above. *See also City of Newport*, 453 U.S. at 256-57.

Fourth, the First Circuit erroneously held that petitioners' rights were not saved by their repeated objections that the parent was not plaintiff's employer. Once petitioners raised an objection to subject matter jurisdiction, it was not *their* burden to show the absence of jurisdiction but, rather, *plaintiff's* burden to show jurisdiction existed.

defendant's status is merely an element of plaintiff's prima facie case.

One group of lower federal courts holds that satisfaction of the "employer" definition is a jurisdictional prerequisite to Title VII claims, and routinely affirms dismissal for lack of subject matter jurisdiction. [13/] A second group of lower courts holds that the status of a defendant as plaintiff's "employer" is both a jurisdictional issue and an element of the Title VII claim on the merits.[14/] This Court has referred in dicta to the

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[13/]Fourth Circuit: *Woodward* v. *Va. Bd. of Bar Exam'rs*, 598 F.2d 1345, 1346 (4th Cir. 1979). *See also Hukill* v. *Auto. Care, Inc.*, 192 F.3d 437 (4th Cir. 1999), *cert. denied*, 529 U.S. 1116 (2000) (analogous FMLA claim).

Sixth Circuit: *Armbruster* v. *Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983). *See also Douglas* v. *E.G. Baldwin & Assocs., Inc.*, 150 F.3d 604, 606-07, 608 (6th Cir. 1998) (FMLA case).

Ninth Circuit: *Herman* v. *United Bhd. Of Carpenters & Joiners of Am., Local No. 971*, 60 F.3d 1375, 1385 (9th Cir. 1995); *Childs* v. *Local 18, Int'l Bhd. Of Elec. Workers*, 719 F.2d 1379 (9th Cir. 1983).

Eleventh Circuit: *Lyes* v. *City of Riviera Beach*, 166 F.3d 1332, 1340 (11th Cir. 1999) ("threshold jurisdiction matter"); *Scarfo* v. *Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999), *cert. denied*, 529 U.S. 1003 (2000); *Virgo* v. *Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994).

[14/]Second Circuit: *DaSilva* v. *Kinsho Int'l Corp.*, 229 F.3d 358, 365 (2d Cir. 2000).

terms "employer" and "commerce" as "jurisdictional provisions." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991). In *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), this Court reviewed the dismissal of a Title VII action for lack of subject matter jurisdiction because the employer did not pass the 15-employee threshold, and did not criticize the propriety of the District Court's treatment of the issue as jurisdictional.

None of the circuits has explicitly addressed the issue whether the same standard should apply when the putative employer is a parent corporation of the direct employer rather than the direct employer itself. Petitioners do not address the more general question whether a jurisdictional issue is presented when the putative defendant is plaintiff's *direct* employer. Petitioners' argument focuses only on attempts to assert jurisdiction over parent corporations as indirect employers.

Fifth Circuit: *Clarke* v. *Tarrant County, Tex.*, 798 F.2d 736, 742 (5th Cir. 1986). *But see Greenlees* v. *Eidenmuller Enter., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) (jurisdictional only).

Seventh Circuit: *Papa* v. *Katy Indus., Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999). *See also Sharpe* v. *Jefferson Distrib. Co.*, 148 F.3d 676, 677-78 (7th Cir. 1998), *abrogated on other grounds* by *Papa* v. *Katy Indus., Inc.*

D.C. Circuit: *EEOC* v. *St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623-24 (D.C. Cir. 1997).

In the case where the defendant is not plaintiff's direct employer and would not be treated as plaintiff's employer under common law agency principles, the issue should be viewed as jurisdictional in nature. This approach corresponds to the principles enunciated in *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946) ("a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.").

In this case, the only purpose behind plaintiff's pursuit of UHI was to avoid the damages caps of 42 U.S.C. § 1981a(b)(3). There was no question of jurisdiction over the subsidiary, nor was there any question that the subsidiary would not be able to satisfy any judgment plaintiff received. The only thing plaintiff accomplished by the joinder of the parent was the ability to introduce into evidence the *parent's* financials and to exhort the jury to add a lot of zeros to the verdict to send a message "all the way out in Phoenix, where U-Haul International is headquartered." Trial Tr. at 545, Closing Argument by Plaintiff's Counsel. Joinder of a parent to evade the damages caps of § 1981a is impermissible and unwarranted, and should be treated as similar to fraudulent joinder in diversity actions. There is no subject matter jurisdiction.

Certiorari should be granted on this important issue of first impression because it dovetails with the principles addressed in

Question 1. When a parent corporation is claimed to be the plaintiff's "employer," the parent's status as an "employer" under Title VII should be treated as an issue of subject matter jurisdiction in the absence of a good faith, non-frivolous claim that the parent participated in or controlled the employment decisions of its subsidiary as to the plaintiff, or that corporate veil piercing principles apply.

CONCLUSION

For all the above reasons, this petition for a writ of certiorari to the First Circuit should be granted.

Respectfully submitted,

U-HAUL INTERNATIONAL, INC. AND U-HAUL CO. OF MAINE, INC.,

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Dated: May 14, 2001

APPENDIX

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 99-2328

KAREN ROMANO,

Plaintiff, Appellee,

v.

U-HAUL INTERNATIONAL,

U-HAUL COMPANY OF MAINE, INC.,

Defendants, Appellants.

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, U.S. District Judge]

Before

Torruella, Chief Judge,

Casellas* and Saris,** District Judges.

Elaine McChesney, with whom Patricia J. Hill, Daniel J. Jackson, James M. Hankins and Bingham Dana LLP were on brief, for appellants.

Jeffrey Neil Young, with whom Stephen J. Sucy, and McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A. were on brief, for appellee.

December 7, 2000

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*Of the District of Puerto Rico, sitting by designation.

**Of the District of Massachusetts, sitting by designation.

TORRUELLA, *Chief Judge.* This is an appeal from a jury verdict in the District of Maine finding that appellants U-Haul International and U-Haul Company of Maine unlawfully terminated appellee Karen Romano on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 and the Maine Human Rights Act. Appellants (for simplicity,[1]/ referenced in this appeal as U-Haul) do not appeal the underlying jury finding of liability. Instead, they oppose the inclusion of U-Haul International in this lawsuit, contending that it cannot properly be considered appellee's "employer" for purposes of Title VII. In addition, U-Haul appeals several issues regarding the imposition of punitive and other damages. We affirm the jury verdict and subsequent action of the district court in all respects.

BACKGROUND

In mid-April of 1996, Greg Nadeau, Manager of the Waterville, Maine U-Haul Center, placed an advertisement in the local paper for a customer service representative. Appellee Karen Romano responded to the advertisement and was told by Nadeau that the job entailed answering phones, renting trucks, and installing trailer hitches. After informing Nadeau that she had customer service experience, had worked with

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[1]/A chief contention in this appeal is whether U-Haul International, U-Haul Company of Maine's parent corporation, is a proper defendant in this lawsuit. Our designation of appellants as "U-Haul" for portions of this opinion is a mere convenience and not intended as a substantive comment on the merits of appellants' claims.

computers, and enjoyed working on cars with her husband (though she had no formal mechanical background), Romano was hired for the position.

Romano began part-time work on May 1, 1996. On her second or third day of work, U-Haul Company of Maine President Paul Smedberg called the Waterville Center. Romano answered the phone. Smedberg seemed quite surprised, inquiring twice whether he had reached U-Haul of Waterville, and then asked to speak with Nadeau. From hearing Nadeau's side of the conversation, Romano discerned that there was a problem with her hiring. After hanging up the phone, Romano testified that Nadeau told her that: "they didn't want women installing hitches, that women are supposed to be working in the main office."

No further training of Romano took place. At the end of her first week, Romano learned that a new employee, Robert Runshe, had been hired. Nadeau reportedly told Romano that he had not hired Runshe; that they "came in over his head." On May 14 or 15, Nadeau called Romano and terminated her employment. According to Romano, Nadeau apologized, claimed no responsibility in the decision but said that it came from higher up. He explained, "The only problem you have is you sit when you pee." Later, Nadeau allegedly repeated that Romano had been fired because of her sex to Romano and her then-husband Nick Romano, to Robert Runshe, and to Romano's father, Roland Daigneault. U-Haul, in contrast, claimed that Romano was fired because she did not have hitch installation experience and there was no time to train her.

Romano filed a complaint against U-Haul on May 18, 1999 charging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, 5 Me. Rev. Stat. Ann. § 4613. Following a three-day trial, the jury returned a verdict in favor of Romano and awarded $0 in compensatory damages, $15,000 in nominal damages, and $625,000 in punitive damages. The district court, concluding that the verdict reflected confusion over compensatory and nominal damages, resubmitted the special interrogatories relating to these damages. After asking the court whether only $1 may be awarded in nominal damages,[2] the jury returned with a verdict of $15,000 compensatory damages and $0 nominal damages. On July 15, 1999, the district court entered judgment for Romano in the amount of $15,000 compensatory damages and $285,000 punitive damages, adjusting the jury award to conform with Title VII punitive damages caps. By Order and Memorandum of October 28, 1999, the district court denied U-Haul's Motions for Judgment as a Matter of Law, for a New Trial, or, in the alternative, for Remittitur.

Appellant U-Haul appeals the following issues: (1) the submission of a jury instruction on the integrated-enterprise test instead of an "agency" test instruction to determine whether both U-Haul International and U-Haul Company of Maine should be considered Romano's

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[2]The district judge responded that while nominal damages are not limited to $1, the amount must be minimal.

employer[3]/ for purposes of Title VII; (2) the formulation of the integrated-enterprise test for purposes of jury instruction; (3) the determination by the jury that U-Haul International and U-Haul Company of Maine are a single employer for purposes of Title VII; (4) the imposition of punitive damages liability on U-Haul International; (5) the resubmission of Special Interrogatories 4 and 5 on compensatory and nominal damages to the jury; and (6) the amount of punitive damages awarded. Appellee Romano disagrees with the substance of appellants' arguments and claims that appellants have waived most of these arguments for failure to properly assert them prior to this appeal. We will discuss each issue in turn.

DISCUSSION

I. Determination of Employer Status for U-Haul International

A. Throughout pre-trial, trial, and post-trial motions, U-Haul International has consistently argued that it was not Romano's employer. In support, U-Haul International offers that it was not responsible for hiring, supervising, or firing Romano. Those responsibilities fell entirely upon U-Haul Company of Maine and its personnel. As to the relationship between U-Haul International and U-Haul Company of Maine, U-Haul described it, in its Motion for Summary

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[3]/Appellants do not dispute that U-Haul Company of Maine was Romano's employer.

Judgment, as a "complex contractual relationship between two entities." This relationship, from U-Haul International's perspective, is insufficient to render it liable under Title VII for Romano's firing.

U-Haul acknowledges that, under certain circumstances,[4] two entities may be sued as a "single employer" under Title VII. The district court, considering which test to instruct the jury on in determining single-employer status, elected to apply the integrated-enterprise test. The integrated-enterprise test, first developed to determine whether interrelated companies should be treated as one entity under the National Labor Relations Act, 29 U.S.C. § 164, examines four factors: 1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. In pre and post-trial motions, U-Haul argued that either the integrated-enterprise test should be instructed with an emphasis on the labor factor, or, preferably, a joint-enterprise test[5] should be given to the jury.

Appellant U-Haul now appeals the district court's choice of the integrated-enterprise test and argues that common-law agency principles[6]

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[4]/For example, in a parent-subsidiary context.

[5]/A joint-enterprise test, as characterized by appellants, determines whether the two entities, while separate, jointly control the terms and conditions of employment.

[6]/Although entirely unclear in U-Haul's Brief, we assume that by "common-law agency principles" appellants

should have determined the single-employer issue. U-Haul's legal support for application of the "agency" test is allegedly based on the principles articulated by the Supreme Court in *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). According to U-Haul, the *Kolstad* decision mandates application of common-law agency principles in Title VII cases. As such, appellant urges that the district court should have instructed the jury using a test formulated by the Seventh Circuit in *Papa* v. *Katy Industries, Inc.*, 166 F.3d 937 (7th Cir. 1999). U-Haul failed, however, to argue prior to filing the brief in this appeal that agency principles should be followed. Appellant had accordingly never cited *Papa* as the proper standard for instructing the jury. Because we find, as discussed below, that U-Haul has forfeited its agency argument, the district court's use of the integrated-enterprise test instead of appellants' agency test is subject to plain error review. Under this standard, we uphold the decision of the district court to instruct on the integrated-enterprise test for determining single-employer status.

Rule 51 of the Federal Rules of Civil Procedure states, in relevant part: "No party may assign as error the giving or the failure to give an

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mean that U-Haul International cannot be liable as Romano's employer unless it is found that U-Haul Company of Maine was U-Haul International's agent. An agent is characterized as one who is authorized to act on behalf of the principal, subject to the principal's control, and who has consented to act in an agency capacity. *See* Restatement (Third) of Agency § 1.01 (Tentative Draft No. 1, 2000).

instruction *unless that party objects thereto* before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added). While it is true that: "[f]rom the outset, UHI [U-Haul International] has consistently argued that it cannot be held responsible as Romano's employer as a matter of law," the agency argument presented in U-Haul's brief was not made by U-Haul in its objections to the jury instructions. Throughout the proceedings, U-Haul repeatedly made the argument that either the integrated-enterprise or the joint-enterprise test should apply. No mention at any time was made by U-Haul that agency principles should govern the employer test. U-Haul did submit a jury instruction on agency (Request No. 8), but then failed to raise it at the charge conference or to object to its absence after jury instructions were given. In fact, U-Haul made no reference to its Request No. 8 on the record at any point. U-Haul cannot claim that its agency argument is preserved simply because it generally objected to being characterized as appellee's employer.

U-Haul further argues that they did raise the agency issue by consistently objecting to the identity-of-employer test. They contend that "technical precision" is not necessary, provided that the objections have been made with "sufficient certainty to apprise the court of the movant's position." *Pstragowski* v. *Metropolitan Life Ins. Co.*, 553 F.2d 1, 3 (1st Cir. 1977). And, in oral argument before this Court, appellants asserted that the agency test they now advocate is merely their joint-enterprise test under a different name, thereby preserving the agency argument.

We fail to see how making a joint-enterprise argument equates with the agency test presented in this appeal. The joint-enterprise test does not adopt common law agency principles as the basis for its determination. The objections made by U-Haul to the district court's construction of the integrated-enterprise test and to the failure to give a joint-enterprise instruction are insufficient to preserve the agency issue on appeal.

U-Haul claims that the district court knew about the availability of an agency test, citing brief references to an agency standard in various party motions and at one point in discussions with the district court. An awareness by the parties and the district court that an agency standard could be one way of determining single-employer status is not sufficient to excuse appellants' obligation to object to the jury instructions under Rule 51. The requirement that the grounds for objecting to a jury instruction must be distinctly stated is treated seriously by this Court. *See Scarfo* v. *Cabletron Sys., Inc.*, 54 F.3d 931, 944 (1st Cir. 1995); *Elwood* v. *Pina*, 815 F.2d 173, 175-76 (1st Cir. 1987). We will not excuse appellants' failure to argue for an agency test during jury instruction objections based on a purely speculative claim that the district court had some awareness that an agency instruction could be given.

U-Haul cites *Lebrón* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), as alternative support for the agency theory being preserved. *Lebrón* stands for the proposition that when a party has sought protection under the United States Constitution or a federal law, that

party may advance additional theories based on that claim that may not have been addressed by the lower courts. In *Lebrón*, appellant had claimed protection under the First Amendment. One argument advanced by petitioner was that Amtrak was a government entity, a theory that petitioner had "expressly disavowed" in the lower courts. *See id.* at 378. The Supreme Court permitted the government-entity argument as an alternative theory under appellant's First Amendment claim because a constitutional right was at stake. This Court has a comparable exception: "cases involving important constitutional or governmental issues may be exceptional and, as such, there should be a full legal treatment of all legal issues involved, whether squarely introduced by the parties or not." *T I Fed. Credit Union* v. *DelBonis*, 72 F.3d 921, 930 (1st Cir. 1995) (citing *National Ass'n of Social Workers* v. *Harwood*, 69 F.3d 622, 628 (1st Cir. 1995)). In this case, appellants are not advancing an alternative argument based on a claim of protection under the Constitution or federal law. Nor are important constitutional or governmental issues at stake. Neither *Lebrón* nor *Harwood*, then, saves appellants from forfeiture of their agency theory claim.

Appellant is also not entitled to application of the exception to the Rule 51 requirement set out in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981). In *City of Newport*, despite petitioner's failure to make a Rule 51 objection, the district court ruled on the substance of the waived argument. *See id.* at 253-54. The Supreme Court held that refusing to hear the claim on the merits when it was addressed by

both lower courts would further no interest in fair trial administration. *See id.* at 255-56. The Newport exception is inapplicable here, because the district court was not given the opportunity to address the substance of the agency argument. At no point in the record is there evidence that the district court addressed the agency argument on the merits. U-Haul's failure to bring the issue squarely before the district court bars application of this exception.

Had appellants fulfilled the requirements of Rule 51, review of the failure to give the jury an instruction on agency would have been governed by the "harmless error" standard of Federal Rule of Civil Procedure 61. Because appellants failed to preserve the issue on appeal, we will not examine whether an agency instruction should have been given instead of an integrated-enterprise instruction unless plain error is apparent. Accordingly, this circuit will only review an issue that has been forfeited on appeal "to prevent a clear miscarriage of justice," *Elgabri* v. *Lekas*, 964 F.2d 1255, 1259 n.1 (1st Cir. 1992), or "where the error 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Lash* v. *Cutts*, 943 F.2d 147, 152 (1st Cir. 1991) (quoting *Smith* v. *MIT*, 877 F.2d 1106, 1110 (1st Cir. 1989)).

Plain error might be found when "the failure to raise the claim below deprived the reviewing court of helpful factfinding; . . . the issue is one of constitutional magnitude; . . . the omitted argument is highly persuasive; . . . the opponent would suffer any special prejudice; . . . and, perhaps most importantly, . . . the issue is of

great importance to the public." *Play Time, Inc.* v. *DS Metromedia Communications, Inc.*, 123 F.3d 23, 30 n.8 (1st Cir. 1997). None of these factors apply to appellants' agency argument. The district court's failure to give the jury an agency instruction did not constitute plain error.

The Supreme Court has not addressed the issue of whether the integrated-enterprise test is appropriate in Title VII cases. The Court's decision in *Kolstad* does not change this, and U-Haul's reliance on this case is misplaced. Although *Kolstad* observed that Congress directed federal courts to interpret Title VII using agency principles, it only analyzed application of agency principles in the context of punitive damages and 42 U.S.C. § 1981a. *See* 527 U.S. at 539-46. The Court did not address single-employer issues at all; *Kolstad*, then, does not demand that plain error be found in this case.

This Court has also declined to reach the issue of what the proper test for determining employer status under Title VII is. In *Mas Marques* v. *Digital Equipment Corp.*, 637 F.2d 24 (1st Cir. 1980), we upheld the district court's holding that the plaintiff's single-employer claim did not meet the standards of any of the possible tests. We identified three "recognized" methods for determining whether a single employer exists under Title VII: the integrated-enterprise test, the corporate law "sham" test, and the agency test. *See id.* at 27. None of the three tests were explicitly adopted or excluded by the First Circuit. The integrated-enterprise test currently appears to be the standard adopted, or at least applied, by a majority of circuits that have reached the issue.

See Hukill v. *Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999) (FMLA, rather than Title VII claim); *Knowlton* v. *Teltrust Phones, Inc.*, 189 F.3d 1177, 1184 (10th Cir. 1999) (applying integrated-enterprise test without explicitly adopting it); *Swallows* v. *Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993-94, (6th Cir. 1997); *Cook* v. *Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240 (2d Cir. 1995); *McKenzie* v. *Davenport-Harris Funeral Home*, 834 F.2d 930, 933 n.3 (11th Cir. 1987); *Childs* v. *Local 18, Int'l Bhd. of Elec. Workers*, 719 F.2d 1379, 1382 (9th Cir. 1983); *Trevino* v. *Celanese Corp.*, 701 F.2d 397, 403-404 (5th Cir. 1983). *Papa*, the case cited by U-Haul as applying agency principles, identified three instances in which it would be appropriate for a parent and subsidiary to be treated as a single employer under Title VII: (1) where the two corporations would be treated as one ("piercing the corporate veil") with regard to creditors' claims under corporate law; (2) where the subsidiary has been created to escape liability under the anti-discrimination laws; or, (3) where the parent corporation "directed the discussion, act, practice, or policy of which the employee of its subsidiary was complaining." *Papa*, 166 F.3d at 941. The Seventh Circuit's primary criticism of the four-factor integrated-enterprise test is that it could subject small firms to Title VII liability that should be protected by the fewer than fifteen (or twenty) employees exemption. *See id.* at 940. "[W]e are hesitant to find an error 'plain' where, as in this case, the legal basis for the proposed instruction . . . is not 'clearly established.'" *Elwood* v. *Pina*, 815 F.2d 173, 176 (1st Cir. 1987). The district court cannot be said to have

committed plain error by following the bulk of available precedent on the issue.

Appellant's argument that the integrated-enterprise test should not have applied and that agency principles should have been substituted has been forfeited for failing to meet the requirement of Rule 51 and for failing to bring the issue before the district court at any time during the proceedings. Instructing the jury on an integrated-enterprise test to determine single-employer status resulted in no miscarriage of justice. Nor did the instruction affect the fairness and integrity of the judicial proceeding. Accordingly, the district court's instruction was not plain error and is affirmed.

B. U-Haul's next argument is that the instruction on the integrated-enterprise test was incorrect. Our review of jury instructions is de novo to ascertain whether the challenged instruction has "a tendency to confuse or mislead the jury with respect to the applicable principles of law." *Tatro* v. *Kervin*, 41 F.3d 9, 14 (1st Cir. 1994). If the instruction is erroneous, a new trial will be ordered if the error, based on the entire record, was prejudicial. *See id.* We will not, then, reverse a judgment if the error that resulted from the incorrect instruction was harmless. *See id.*

The district court accurately set out the four factors of the integrated-enterprise test. U-Haul complains that the district court did not emphasize the control over labor relations factor and that the district court included other considerations beyond the four factors. The jury was instructed as follows (emphasis added):

> Now, to succeed on these claims, the plaintiff must first prove by a preponderance of the evidence, more likely true than not true, that each of the defendants in this case was her employer . . . . In order to determine whether U-Haul International was the plaintiff's employer, you must consider the relationship between U-Haul International and U-Haul Company of Maine, including the extent to which there is: one, *interrelation of operations*; two, *common management*; three, *centralized control of labor relations*; and four, *common ownership*.
>
> *Also, relevant* to this inquiry are *factors such as* whether U-Haul International exerts considerable influence over U-Haul Company of Maine's *personnel policies, advertising and other decisions*, and whether U-Haul International controls U-Haul Company of Maine's *sales goals, marketing strategies, sales catalogs*, and *advertising*.

We hold that the district court did not properly set out the integrated-enterprise test for the jury.

Of the circuits that have applied the integrated-enterprise test, there is near unanimity that control of labor operations i.e., control of employment decisions, is the most important of the four factors. See *Hukill*, 192 F.3d at 442; *Llampallas* v. *Mini-Circuits, Lab, Inc.*, 163 F.3d

1236, 1244-45 (11th Cir. 1998) (finding that control of employment decisions is critical under either integrated-enterprise or joint-employer test); *Lockard* v. *Pizza Hut, Inc.*, 162 F.3d 1062, 1070 (10th Cir. 1998); *Lusk* v. *Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997); *Swallows*, 128 F.3d at 994; *Cook*, 69 F.3d at 1241. We agree with the above circuits and adopt the view that control of employment decisions is a primary consideration in evaluating employer status.

Appellants argue that the district court erred in failing to instruct the jury that the ultimate question was whether the parent corporation was a final decision maker in connection with the employment at issue. The circuits have differed in the level of control that is required in order to satisfy the control of employment prong. The Fifth and Tenth Circuits have held that a "'parent's broad general policy statements regarding employment matters are not enough' to make the required showing of centralized control over labor relations. 'To satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary.'" *Lockard*, 162 F.3d at 1070 (quoting *Frank* v. *U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993)); *see Lusk*, 129 F.3d at 777-78. The rationale for a more stringent requirement of inter-relatedness is based on the corporate law principle of limited liability. *See Lusk*, 129 F.3d at 778. Limited liability prevents a parent corporation from being held responsible for the acts of its subsidiaries unless the separateness of the entities is a sham, and "there is an absence of

an arm's-length relationship among the companies." *Knowlton*, 189 F.3d at 1184.

Although the argument for wholesale incorporation of limited liability has substantial support, the exclusive focus on individual hiring and firing decisions conflicts with the remedial public policy goal of anti-discrimination laws. *See Lusk*, 129 F.3d at 777 n.3. In addition, a stringent emphasis on the labor prong renders the other three factors of the integrated-enterprise test devoid of impact, essentially reducing the test to a one-question inquiry. We choose to follow the more "flexible" approach adopted by the Second Circuit which focuses on employment decisions, but only to the extent that the parent exerts "'an amount of participation [that] is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions.'" *Cook*, 69 F.3d at 1240-41 (quoting *Armbruster* v. *Quinn*, 711 F.2d 1332, 1338 (6th Cir. 1983)). Accordingly, we hold that the district court should have directed the jury to place particular emphasis on the interrelation of employment decisions between U-Haul International and U-Haul Company of Maine.

We now turn to the additional considerations on which the district court instructed the jury and which U-Haul contests were improper. The district court began the employer instruction by setting out the four factors of the integrated-enterprise test. The court then identified other "relevant" factors, such as influence over personnel decisions and advertising and establishment of sales goals and

marketing strategies. Appellants cite *Schweitzer* v. *Advanced Telemarketing Corp.*, 104 F. 3d 761 (5th Cir. 1997), in support of the argument that these additional factors should not have been included in the instruction. In *Schweitzer*, the district court added financing of the subsidiary by the parent and inadequate capitalization of the subsidiary to the integrated-enterprise test factors. *See Schweitzer* at 765. The Fifth Circuit found error in the instruction, holding that the additional factors were irrelevant to the single-employer inquiry. *See id.*

Appellants should have no complaint with the instruction by the district court to consider influence over personnel decisions. This goes directly to the most important factor, control of employment decisions, making it indisputably relevant to the jury's deliberations. As for sales, marketing, and advertising, these factors may be considered under the interrelation of operations prong, but only insofar as the parent is involved "directly in the subsidiary's daily decisions." *Lusk*, 129 F.3d at 778. The district court should have been clear that U-Haul International's involvement must have been proactive in order to be relevant. Furthermore, by singling out advertising, marketing, and sales, the instruction might have led the jury to believe that these factors took significance over other, equally important considerations. At a minimum, the district court should have identified these factors as examples falling under the interrelation of operations prong and provided other examples of

interrelation.[7] The inclusion of additional considerations in this manner when instructing on the integrated-enterprise test was error.

Having held that the jury instruction on the integrated-enterprise test should have identified control of employment as the most important, but not exclusive factor, we examine whether the error was harmful to the appellants such that the case must be remanded for a new trial. *See* Fed. R. Civ. P. 61. A new trial is necessary only "if the error could have affected the result of the jury's deliberation." *Allen* v. *Chance Mfg. Co.*, 873 F.2d 465, 469 (1st Cir. 1989). In making that determination, we consider whether we can say "with fair assurance that the judgment was likely unaffected." *Putnam Res.* v. *Pateman*, 958 F.2d 448, 471 (1st Cir. 1992). In this case, the error in the formulation of the integrated-enterprise test was one of emphasis, and there was substantial evidence presented at trial on the employer question. We hold that the incorrect jury instruction likely did not affect the ultimate determination by the jury that U-Haul International was appellee's employer, and the error, therefore, was harmless.

The errors in the integrated-enterprise instruction were harmless when considered with the single-employer evidence presented at trial. Romano offered the following evidence relating to

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[7] Examples include: shared employees, services, records, office space, and equipment, commingled finances, and handling by the parent of subsidiary tasks such as payroll, books, and tax returns. *See Knowlton*, 189 F.3d at 1184 n.7; *Lusk*, 129 F.3d at 778.

U-Haul International's status: (1) U-Haul Company of Maine is owned in its entirety by U-Haul International; (2) the two companies share three directors; (3) U-Haul International receives revenues from U-Haul of Maine's transactions as well as a daily report of the same; (4) U-Haul International establishes equipment rental rates; (5) U-Haul International provides accounting services to U-Haul of Maine; (6) U-Haul International provides legal, marketing, budgeting, accounting, and training services to U-Haul of Maine; (7) there is interchange of employees between the two companies; and, most importantly, (8) U-Haul International sets human resources and personnel policies, establishes the wage scale, the pay day, and all fringe benefits, must approve pay in excess of the scale, limits shift premiums and the hours of part-timers, processes payroll, prohibits payroll advances, must approve any rehire, maintains duplicate personnel records, and invites employees of U-Haul of Maine to present complaints concerning discrimination, sexual harassment and leaves of absence to U-Haul International's Human Resources Department. Based on this evidence, the jury could have concluded that each of the four factors of the integrated-enterprise test had been satisfied. Further, there were multiple examples of U-Haul International's involvement in employment-related matters. Even if the instruction had emphasized the control of employment prong, it is not apparent that the jury would have reached a different conclusion. The error, then, was not harmful, and no new trial is warranted.

C. Appellants' related challenge to the Special Verdict Question 1: "Did U-Haul International control the operations of U-Haul Co. of Maine to such an extent that U-Haul Co. of Maine's actions are attributable to U-Haul International?," is waived for failure to object to the question at the time of trial. While appellants repeatedly objected to the instruction given by the district court to the jury on the integrated-enterprise test, they did not mention Special Verdict Question 1 at either the charging conference or during their post-instruction objections. Our review is thus limited to plain error, *see Arthur D. Little, Inc.* v. *Dooyang Corp.*, 147 F.3d 47, 53 (1st Cir. 1998), of which there is none. Even under the abuse of discretion standard, Special Verdict Question 1 is not erroneous, because it does not conflict with our articulation of a proper integrated-enterprise instruction.

D. Appellants argue that there was insufficient evidence of an integrated-enterprise to support a finding that U-Haul International was appellee's employer.[8] Appellee counters that this argument is waived for failure to articulate the objection with specificity at the close of evidence. Whether or not appellants sufficiently renewed their objection[9] is not one we must

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[8]Appellants have not been clear whether they are challenging the submission of the question to the jury or the finding by the jury. We will treat the question, as did the district court in its Order denying judgment as a matter of law or a new trial, as a challenge to the jury verdict.

[9]All parties concede that appellants made the sufficiency argument at the close of appellee's case. The

address, because the evidence, as discussed above and viewed in the light most favorable to the appellee, is more than sufficient to uphold the determination by the jury. *See Transamerica Premier Ins. Co.* v. *Ober*, 107 F.3d 925, 929 (1st Cir. 1997). For the same reason, we decline to reverse the district court's denial of a new trial on this issue. *See id.* (verdict must be so contrary to the evidence that a miscarriage of justice would result).

II. Damages

A. The Supreme Court decided *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), just prior to the commencement of this trial. After commenting that *Kolstad* had potential impact on the case, the district court determined that its application would be resolved at the conclusion of evidence at trial. In this appeal, appellants challenge the jury verdict finding punitive damages as improper under *Kolstad*. Appellee counters that the argument is waived, not having been properly raised in appellants' motion for judgment as a matter of law. Given the relatively contemporaneous occurrence of the *Kolstad* decision and the trial in this case, as well as the district court's decision to address *Kolstad* after the close of evidence, we will address appellants' *Kolstad* argument.

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waiver issue concerns whether appellants incorporated this argument into their motion for judgment as a matter of law at the close of all evidence, as required to preserve the issue for appeal.

Kolstad addressed the availability of punitive damages in Title VII cases under 42 U.S.C. § 1981a(b)(1); specifically, in what category of discrimination cases a plaintiff may recover punitive damages. The Court held that Congress intended to authorize punitive damages in "only a subset of cases involving intentional discrimination." *Id.* at 534. The Court interpreted the statute's "malice" or "reckless indifference to the federally protected right [ ]," however, as not requiring evidence that the misconduct was egregious. *See id.* at 535. Instead, the inquiry should focus on the acting party's state of mind. *See id.* Thus, punitive damages are available in cases in which the employer has, at minimum, engaged in the discriminatory action "in the face of a perceived risk that its actions will violate federal law." *Id.* at 536.

The Court went on to discuss imputing punitive damages liability for the bad acts of the individual onto the employer. Common law limits vicarious liability for punitive damages through agency principles. *See id.* at 541. As such, the Court held that an employer may be liable for punitive damages under Title VII in four instances: (1) when the agent has been authorized by the principal to commit the misconduct in question; (2) when the principal recklessly employed the unfit agent; (3) when the agent, acting in a managerial capacity, committed the misconduct within the scope of the employment; or, (4) when the agent's bad act was subsequently approved by the principal. *See id.* at 542-43. The Court limited the reach of the third situation by absolving an employer from

liability for punitive damages if a good-faith effort to comply with the requirements of Title VII is made. *See id.* at 545-46. It is this aspect of the *Kolstad* holding that is most critical to the instant case.

The district court issued a proper *Kolstad* jury instruction on the issue of punitive damages:

> You may award the plaintiff punitive damages if you find . . . that the acts or omissions of the defendants were done maliciously or with reckless indifference to her federally protected rights . . . . You are not to award punitive damages against U-Haul International or U-Haul Company of Maine if you find that they made a good-faith effort to prevent discrimination in the workplace.

Appellants argue that the jury findings with respect to state of mind of the individuals who fired Romano, the managerial status of those individuals, and the efforts of U-Haul International and U-Haul Company of Maine to comply with Title VII were unsupported by the evidence presented at trial. We reject each of these contentions in turn.

As to the state of mind, there is ample evidence to suggest that Nadeau, Romano's immediate supervisor, was aware that firing Romano was discriminatory. Smedberg, the U-Haul of Maine President who allegedly ordered the firing, apparently knew about U-Haul's anti-discrimination policies. Construing the

evidence most favorably to appellee, the jury could have reasonably concluded that the actions by Nadeau and Smedberg were taken with reckless disregard to appellee's federal rights.

The argument that Smedberg cannot be a "manager" of U-Haul International because he allegedly did not work for U-Haul International also fails. After finding that U-Haul International and U-Haul Company of Maine were a single employer for purposes of Title VII, Smedberg's position as President of U-Haul Company of Maine qualifies him as a manager of U-Haul International as well. *See Lowery* v. *Circuit City Stores, Inc.*, 206 F.3d 431, 447 (4th Cir. 2000).

Appellants' assertion that appellee bears the burden of proving appellants' lack of good faith efforts to comply with Title VII is incorrect. Although *Kolstad* does not state specifically which party must put forth such evidence, the good-faith aspect of *Kolstad* has subsequently been characterized as an affirmative defense, *see Passantino* v. *Johnson & Johnson Consumer Prods. Inc.*, 212 F.3d 493, 516 (9th Cir. 2000); *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 188 F.3d 278, 286 (5th Cir. 1999), and an exception to vicarious liability, *see Odgen* v. *Wax Works, Inc.*, 214 F.3d 999, 1009 (8th Cir. 2000); Lowery, 206 F.3d at 445; *Remedies: Kolstad's "Good-Faith" Defense Means What It Says*, 15 NO. 2 Fed. Litigator 47 (Feb. 2000). We agree with these characterizations. The defendant, therefore, is responsible for showing good faith efforts to comply with the requirements of Title VII.

Kolstad did not articulate any specific evidence necessary for a finding of good-faith effort. Circuit and district courts have since attempted to add substance to the standard, and we are persuaded by their general conclusions. We hold that a written non-discrimination policy is one indication of an employer's efforts to comply with Title VII. *See Lowery*, 206 F.3d at 446. But a written statement, without more, is insufficient to insulate an employer from punitive damages liability. *See Odgen*, 214 F.3d at 1010; *EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1248 (10th Cir. 1999). A defendant must also show that efforts have been made to implement its anti-discrimination policy, through education of its employees and active enforcement of its mandate. "Although the purpose of Title VII is served by rewarding employers who adopt anti-discrimination policies, it would be undermined if those policies were not implemented, and were allowed instead to serve only as a device to allow employers to escape punitive damages for the discriminatory activities of their managerial employees." *Passantino*, 212 F.3d at 517.

Appellants did put forth evidence regarding their efforts to comply with anti-discrimination law. Both U-Haul International and U-Haul of Maine distribute materials regarding their policies of hiring women, minorities, and disabled persons. Managers and supervisors are advised that termination because of gender is prohibited by law and are instructed to hire on the basis on qualifications and not on discriminatory factors. U-Haul, however, did not put forth evidence of an active mechanism for renewing employees'

awareness of the policies through either specific education programs or periodic re-dissemination or revision of their written materials. There was no testimony by appellants' witnesses that indicated that supervisors were trained to prevent discrimination from occurring. Further, appellants did not give examples in which their anti-discrimination policies were successfully followed. We do not hold that appellants were required to present evidence on *all* of these factors in order to qualify for the good-faith defense. But based on the evidence that was presented to the jury, construed most favorably for the appellee, we find that the jury's conclusion in this regard was reasonable, and we will not disturb the verdict.

B. Appellants next argue that the district court erred in resubmitting the compensatory and nominal damages questions to the jury after the jury returned an initial verdict of $0 in compensatory damages and $15,000 in nominal damages. The district court determined that there was a mistake on the verdict form; that the $15,000 nominal damages award did not accord with the district court's instructions that nominal damages be minimal, "such as one dollar." The district court surmised that the jury probably confused nominal with compensatory damages and proposed resubmitting the two questions, after repeating the jury instructions, to the jury. The ultimate result of the resubmission resulted in the jury awarding $15,000 in compensatory damages and $0 in nominal damages.

Appellants did not object to the resubmission of the compensatory and nominal damages questions. In conference with the district judge, appellants suggested either resubmission of all the damages questions (i.e., including punitive damages) or declaring a mistrial because the jury "is fatally confused on the concept of damages . . . [including] punitive damages." On appeal, appellants change tack, arguing that the jury was not confused and that the district court should not have resubmitted questions to the jury, but instead should have accepted the nominal damages award and reduced it accordingly.

The standard of review for a determination of resubmission of special verdict questions is for abuse of discretion. *See Scott-Harris* v. *City of Fall River*, 134 F.3d 427, 435 (1st Cir. 1997), *rev'd sub nom. on other grounds Bogan* v. *Scott-Harris*, 523 U.S. 44 (1998). A failure to object to verdict inconsistency before the jury is discharged constitutes waiver. *See Coastal Fuels of P.R., Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 201 (1st Cir. 1996). Appellants' failure to object to resubmission when the district court gave both parties an opportunity to voice any objections similarly limits our review. We review the district court's decision, then, for plain error and hold that none is evident in the resubmission of the questions on compensatory and nominal damages.

The district court characterized the verdict as improper because the jury awarded $15,000 in nominal damages. Nominal damages are intended to recognize a plaintiff's legal injury

when no actual monetary damages may be discerned. *See Magnett* v. *Pelletier*, 488 F.2d 33, 35 (1st Cir. 1973). The amount of nominal damages that may be awarded is not limited to $1. The nature of nominal damages compels, however, that the amount be minimal, and we have held that an amount of even $500 exceeds the appropriate higher boundary of nominal damages. *See id.* ("Five hundred dollars charged against an individual police officer is no mere token.") The district court was correct, then, in concluding that the jury could not have understood the concept of nominal damages properly. Appellants contend that this apparent mistake on the part of the jury is a mistake only as to the amount that they could award in nominal damages. The district court disagreed, surmising that the jury probably confused nominal with compensatory damages, prompting the decision to resubmit both questions. Appellants argue that resubmission was improper because special verdict questions may only be resubmitted to the jury when there is an inconsistency within the verdict and there is no view of the verdict that can reconcile the inconsistency. *See Santiago-Negrón* v. *Castro-Dávila*, 865 F.2d 431, 444 (1st Cir. 1989). Appellants are correct that there was not an inconsistency within this verdict under all possible views. Had the district court adopted appellants' version of the jury's error, the nominal damages award would not be inconsistent with any other part of the verdict, but instead only incorrect as to the nominal damages instruction. This is not a case, then, in which the verdict is "inconsistent" as identified in *Santiago-Negrón*.

Under either the district court's or appellants' interpretations, however, the jury was obviously unclear as to the proper role for nominal damages. In *Atlantic Tubing & Rubber Co.* v. *International Engraving Co.*, the jury returned a verdict that the district judge believed contained answers to special interrogatories that were either "inconsistent or ambiguous." 528 F.2d 1272, 1275 (1st Cir. 1976). The district court accordingly determined that additional, clarifying questions needed to be submitted to resolve the confusion. In examining this decision, we held that the trial court had "considerable discretion . . . [in its decision whether to refuse] to enter judgment on the bases of a jury's answer to a set of interrogatories," and that such a decision "should not be reversed simply because an appellate court concludes that it is possible to reconcile the jury's responses." *Id.* at 1276 (cited with approval in *Santiago-Negrón*, 865 F.2d at 444). In another case, we upheld the district court's resubmission of a jury question for clarification as "precisely correct" and affording the jury a "timely opportunity to straighten out both apparent, and possible mistakes." *Poduska* v. *Ward*, 895 F.2d 854, 857 (1st Cir. 1990). *See also Smith* v. *Riceland Foods, Inc.*, 151 F.3d 813, 821 (8th Cir. 1998) ("A district court has discretion to decide whether a jury's findings on a verdict form are incomplete, confusing, or inconsistent and whether to resubmit the claim to the jury.").

The jury confusion in this case resembles that found in *Atlantic Tubing* and *Poduska*, and thus the requirement of absolute inconsistency established in *Santiago-Negrón* does not apply.

The district court's decision to resubmit the two questions and allow the jury an opportunity to correct its mistake does not rise to the level of plain error, or even abuse of discretion. The jury had not yet been discharged, and counsel was provided with a full opportunity to object to the resubmission. *See Santiago-Negrón*, 865 F.2d at 444. The district court's interpretation of the jury's verdict made logical sense. It did not take the decision-making role away from the jury and gave the jury a second chance to render a proper verdict. The district court was clear in its instruction of what appellee needed to prove in order to be entitled to compensatory damages. There is no indication that the jury disregarded the jury instructions on damages on second hearing. The jury was not forced or coerced by the judge into reversing the nominal and compensatory damages awards. They could have simply reduced the nominal damages to an appropriate amount. We conclude that the district court took the appropriate and "safest" course. *Scott-Harris*, 134 F.3d at 435.

Because we affirm the district court's decision to reinstruct on compensatory and nominal damages, we need not address appellants' arguments regarding the availability of punitive damages in the absence of compensatory damages.

C. U-Haul's final argument is that the punitive damages award is grossly excessive and violates the Fifth and Fourteenth Amendments. The jury award of $625,000 was reduced to $285,000 by the district court to conform with the punitive damages cap imposed by 42 U.S.C. §

1981a(b) (3). Appellants allege that the 19 to 1 ratio between punitive and compensatory damages cannot stand when measured by the three guideposts identified by the Supreme Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996). For the reasons set out below, we disagree.

Review of a punitive damages award is de novo, and the award will stand unless we find it "certain" that the amount in question exceeds that necessary to punish and deter the alleged misconduct. *See Quint* v. *A.E. Staley Mfg. Co.*, 172 F.3d 1, 14 n.11 (1st Cir. 1999). Similarly, in *BMW*, the Supreme Court identified punitive damages awards that "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment" as those that surpass the goals of punishment and deterrence. 517 U.S. at 568. Fundamental to the due process analysis is whether the defendant received fair notice that the conduct in question was prohibited and what the potential penalty for engaging in that conduct could be. *See id.* at 574. To facilitate this inquiry, the Court provided three "guideposts" useful in determining whether a defendant received adequate notice of the punitive damages award: (1) the degree of reprehensibility of a defendant's conduct; (2) the ratio between punitive and actual and potential damages; and, (3) a comparison of the punitive damages figure and other civil and criminal penalties imposed for comparable conduct. *See id.* at 574.

This case was brought under Title VII of the Civil Rights Act of 1964, and the punitive

damages award was authorized and limited by 42 U.S.C. § 1981a. A congressionally-mandated, statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that appellants' due process rights have not been violated. In explaining why a comparison of comparable penalties is important to the excessiveness inquiry, the Court commented: "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue."' *Id.* at 583 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Accordingly, a punitive damages award that comports with a statutory cap provides strong evidence that a defendant's due process rights have not been violated. *See EEOC* v. *Wal-Mart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999).

Even subjecting the $285,000 award to the *BMW* three-guidepost analysis, we find that the amount is constitutionally permissible. To begin, we note that the level of reprehensibility of appellants' alleged misconduct is "perhaps the most important indicium." *BMW*, 517 U.S. at 575. Viewing the evidence most favorably to the non-moving party, we conclude that the harms inflicted upon Romano were more than "purely economic in nature." *Id.* at 576. According to testimony, Romano was fired from her job as a customer service representative after less than two weeks of work, because she "sit[s] when she pees." This statement, and those made

subsequently to her former husband, her father, and to the man hired to replace her, likely came as a humiliating shock and evinced a blatant disregard of federally and state-mandated anti-discrimination laws. In addition, evidence was presented at trial suggesting that Nadeau had said he would deny all of the alleged comments that he made regarding Romano being terminated because of her sex in the event of a discrimination suit. Given the testimony that appellants knowingly violated appellee's federally protected rights and then attempted to conceal this violation, we find that appellants' actions were more reprehensible than would appear in a case involving economic harms only. *See id.* at 579.

The second consideration in the *BMW* analysis is proportionality. The Court dismissed any simple, mathematical formula in favor of general inquiry into reasonableness. *See id.* at 582-83. As such, "particularly egregious" conduct that results in relatively low actual damages can support a higher ratio than conduct, that is less reprehensible. *See id.* at 582. Most ratios will fall within an acceptable range, with only a 500 to 1 disparity being explicitly cited by the Court as "'rais[ing] a suspicious judicial eyebrow.'" *Id.* at 583 (quoting *TXO Prod. Core.* v. *Alliance Res. Corn.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)). In this case, the ratio between punitive and compensatory damages was 19 to 1. Given the low actual damages due to appellee's short period of employment and the difficulty in measuring actual damages in a case involving "primarily personal" injury, we hold that this is a

constitutionally acceptable ratio between punitive and compensatory damages. *Deters* v. *Equifax Credit Info. Servs.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

Finally, there are no civil or criminal penalties imposed for comparable misconduct here. Enforcement of Title VII is delegated to the private citizen who has suffered an injury. But as discussed above, a defendant, through the statutory scheme of Title VII and the punitive damages cap figures set out therein, has full notice of the potential liability to which it was subject. *See Deters*, 202 F.3d at 1272. Appellants' due process claim as to the amount of punitive damages awarded is rejected.

CONCLUSION

We hold that U-Haul's argument for an agency standard rather than the integrated-enterprise test in determining U-Haul International's status as Romano's employer is waived for failure to object according to the requirements of Rule 51. The error in formulating the integrated-enterprise test for the jury is harmless, and the jury finding that U-Haul International was Romano's employer for purposes of Title VII liability is upheld. The district court's resubmission of special interrogatories on nominal and compensatory damages was proper. Finally, the imposition of punitive damages liability on U-Haul does not violate *Kolstad*, nor is the punitive damages award constitutionally excessive. On all issues, we **affirm** with costs awarded to appellee.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO, Plaintiff	)	
v.	)	Civil 98-0106-B
U-HAUL INTERNATIONAL, INC, et al.	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

Defendants, U-Haul International, Inc. ("UHI"), and U-Haul Co. of Maine, Inc. ("UHCM"), move for judgment as a matter of law, a new trial, and, in the alternative, for remittitur following a jury verdict finding them liable for sex discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, and awarding Plaintiff, Karen Romano, a total of $15,000 in compensatory damages and $625,000 in punitive damages. The Court reduced the punitive damages award to $285,000 in conformity with 42 U.S.C. § 1981a(b)(3).

In their Motion for Judgment as a Matter of Law, Defendants restate legal and factual arguments made in their Motion for Summary

Judgment and at trial. The Court rejects these arguments for the reasons previously stated on the record. A jury verdict may be set aside "only after a determination that the evidence could lead a reasonable person to only one conclusion." *Hendricks & Assoc., Inc. v. Daewoo Corp.*, 923 F.2d 209, 214 (1st Cir. 1991) (internal quotation and citations omitted). A court is "compelled . . . even in a close case, to uphold the verdict unless the facts and inferences, when viewed in the light most favorable to the party for whom the jury held, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have arrived at this conclusion." *Hendricks & Assoc., Inc.*, 923 F.2d at 214 (internal quotation and citation omitted). Having reviewed the trial record, the Court declines to disturb the jury verdict. The evidence presented at trial did not compel a verdict in UHI and UHCM's favor. Defendants' Motion for Judgment as a Matter of Law is DENIED.

The Court also declines to order a new trial. A court "may not upset the jury's verdict merely because he or she might have decided the case differently." *Velasquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir. 1993). Rather, a new trial is appropriate only if "the verdict was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." *PH Group Ltd. v. Birch*, 985 F.2d 649, 653 (1st Cir. 1993). As discussed above, the Court cannot conclude that the weight of the evidence clearly dictated a verdict different than the one rendered by the jury. Defendants' Motion for a New Trial is DENIED.

In their Motion for Remittitur, Defendants argue that the $285,000 punitive damages award violates the Due Process Clause of the Fifth and Fourteenth Amendments and is excessive and should be reduced. In order for a punitive damages award to be constitutionally excessive, a the Court must consider (1) the degree of reprehensibility of the conduct; (2) the ratio between compensatory and punitive damages; and (3) the sanctions for comparable misconduct. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-583 (1996). A Court can also overturn a damages award if "it is 'grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" *Blinzler v. Marriott Int'l. Inc.*, 81 F.3d 1148, 1161 (1st Cir. 1996) (quoting *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1197 (1st Cir. 1995)). The Court finds that the punitive damages award, already reduced by this Court in accordance with the statutory cap of Title VII, neither violates Due Process nor is excessive as a matter of law.

The Court is persuaded, after thoroughly examining the record, that the jury rendered a supportable verdict and that the present damages award is not excessive. Defendants' Motions for Judgment as a Matter of Law, for a New Trial,

and, in the alternative, for Remittitur are DENIED.

SO ORDERED.

/s/ Morton A. Brody
MORTON A. BRODY
United States District Judge

Dated this 28th day of October, 1999.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civ. No.
	)	98-106-B
U-HAUL INTERNATIONAL, et al.,	)	
	)	
	)	
Defendants	)	

JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Morton Brody, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict on June 29, 1999 against defendants in the amount of $15,000 compensatory damages and $625,000 punitive damages.

It is ORDERED AND ADJUDGED that the plaintiff take $15,000 in compensatory damages and that plaintiff take $285,000 in punitive damages, plus interest, attorney's fees and costs, the award being reduced in conformance with 42 U.S.C. § 1981 a(b)(3).

SO ORDERED.

Dated this 15th day of July, 1999.

/s/ Morton A. Brody

MORTON A. BRODY

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KAREN ROMANO,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CIVIL 98-0106-B
	)	
U-HAUL INTERNATIONAL, et al.,	)	
	)	
	)	
Defendants	)	

AMENDED JUDGMENT

This matter came on for trial before the Court and a jury, Honorable Morton A. Brody presiding, and the issues having been duly tried and the jury having rendered its verdict on June 29, 1999 against defendants in the amount of $15,000.00 compensatory damages and $625,000.00 punitive damages, and pursuant to the Order and Memorandum of Decision entered by the Court on October 28, 1999, denying Defendants' Motions for Judgment as a Matter of Law, for New Trial and in the alternative, for Remittitur;

It is hereby ORDERED AND ADJUDGED, that the plaintiff take $15,000.00 in compensatory damages and that plaintiff take $285,000.00 in punitive damages, plus interest, attorney's fees and costs, the award being

reduced in conformance with 42 U.S.C. § 1981a (b) (3).

/s/ Julie G. Walentine

Julie G. Walentine

Deputy Clerk

Dated this 29th day of October, 1999.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-2328

KAREN ROMANO,
Plaintiff-Appellee,

v.

U-HAUL INTERNATIONAL, U-HAUL COMPANY OF MAINE, INC.,
Defendants-Appellants.

BEFORE

TORRUELLA, Chief Judge,
SELYA*, BOUDIN, STAHL, LYNCH and LIPEZ
Circuit Judges,
CASELLAS** and SARIS***, District Judges.

ORDER OF COURT

Entered: February 13, 2001

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: /s/ Janice M. O'Neil

Chief Deputy Clerk

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*Judge Selya is recused from this matter.
*Of the District of Puerto Rico, sitting by designation.
*Of the District of Massachusetts, sitting by designation.

[cc: Mr. Young and Ms. McChesney]

APPENDIX D

42 U.S.C. § 2000e

§ 2000e. Definitions

For the purposes of this subchapter—

. . .

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

. . .

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters

thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 1981a

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) [42 U.S.C.A. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3) [42 U.S.C.A. §§ 2000e-2, 2000e-3, or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g)

of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-5(g)], from the respondent.

. . .

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

. . .

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.